(13)

SUPREME COURT OF THE UNITED STATES

No. 280

HARRY KORTZ, PETITIONER,

vs.

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, a corporation, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

MAX P. ZALL,
Denver, Colorado,
Counsel for Petitioner.

EASTWOOD PRINTING CO., 2031 CURTIS STREET, DENVER

SUBJECT INDEX.

TABLE OF CASES CITED.

TEXT BOOKS OR ANNOTATIONS CITED.

SUPREME COURT OF THE UNITED STATES

No.

HARRY KORTZ, PETITIONER,

vs.

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, a corporation, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

Harry Kortz, the petitioner herein, respectfully petitions this Honorable Court for a Writ of Certiorari directed to the United States Circuit Court of Appeals for the Tenth Circuit, and as grounds therefor and in support thereof respectfully shows:

A. SUMMARY—STATEMENT OF MATTERS INVOLVED.

(The petitioner herein will be referred to as Kortz and the respondent as Guardian, and the figures in parentheses shall refer to the pages of the printed Transcript of Record.)

Kortz was the insured under a life insurance policy issued by Guardian, dated August 20th, 1923, which provided in addition to the usual life insurance provisions for total and permanent disability benefits, for which benefits an additional premium was charged by Guardian and paid by Kortz (289). The total and permanent disability provision is as follows:

> "And during total and permanent disability of the insured the company agrees to pay to the insured a monthly income of $220.00 and to waive payment

of premiums hereunder subject to the provisions contained in paragraph 22 hereof."

Paragraph 22 of said policy is as follows:

"22. Benefits in Case of Total and Permanent Disability.—If due proof shall be furnished to the company at its Home Office that the Insured, before attaining the age of sixty years and while there was no default in payment of premium hereunder and this policy was in full force and effect, has either (a) become totally and permanently disabled by bodily injury or disease so that he is and will be permanently, continuously and wholly prevented thereby from performing any work or from following any occupation whatsoever for remuneration or profit, or (b) suffered the total and irrecoverable loss of the sight of both eyes, or the loss by severance of both entire hands or of both entire feet or of one entire hand and one entire foot, hereinafter referred to as "Specified Disabilities", then upon approval of such proof, the Company will grant the monthly income and waiver of premium benefits specified below, the disability under (a) above being presumed to be permanent if it is present and has been in existence continuously for not less than three consecutive months and the disabilities under (b) above being considered in themselves total and permanent disabilities hereun-
7 der without prejudice to other causes of disability.

Disability Income. The Company will begin to pay to the Insured the disability income stated on the first page hereof to be reckoned from the date of the receipt by the Company of satisfactory proof of total and permanent disability of the Insured or of the Insured's continuous total disability for three consecutive months. Such payments will be made on said date in each calendar month during the lifetime of the Insured and the continuance of such disability, and the amount of the payment to be made on approval of such proof shall include any monthly pay-

ment or payments that may have become due prior to such approval.

Waiver of Premiums. The Company will waive payment of further premiums becoming due hereunder during such disability, save any unpaid premium or premiums necessary to complete premium payments, for the first policy year. Any premium or premiums for the then current policy year other than the first policy year which shall have become due after the beginning of such disability and prior to approval of the proof hereof, will if paid, be refunded.

The face amount of the policy shall not be decreased because of any premiums waived or any income payments made, nor shall such waived premiums or income payments be deducted in any subsequent settlement of the policy, and the loan and surrender values will increase each year in the same manner and the amounts of the dividends will be the same as if each premium had been paid when due instead of being waived.

8 The Company will admit the age of the Insured when furnished with satisfactory evidence of the date of birth and reserves the right to require such proof of date of birth at the time proof of disability is furnished.

The Company shall not be liable to waive any premiums or pay any income under this provision *of* the disability shall result from military or naval service in time of war, or from performing such service within one year from the date hereof in time of insurrection or riot, or from performing within said year police duty of any kind, or from engaging or participating within said year as a passenger or otherwise in aerial navigation or service connected therewith.

Recovery from Disability. Although the proof of total and permanent disability may have been accepted by the Company as satisfactory, the Company may at any time demand due proof of the continu-

ance of such total disability, but not oftener than once a year after such disability has continued for two full years; and upon failure to furnish such proof or if it shall appear to the Company, except in the case of the Specified Disabilities mentioned above, that the Insured is able to perform any work or follow any occupation whatever for remuneration or profit, no further premiums shall be waived and no further income payments shall be made.

Premium, Discontinuance. The Disability Benefits herein set forth are granted in consideration of the special premium stated on the first page hereof. This special premium is payable only before the Insured has attained the age of sixty years. Any premiums becoming due under this policy after said age will be correspondingly reduced.

9 At the end of any policy year before the Insured has attained age sixty the provisions of this policy for Disability Benefits will be discontinued upon the written request of the Insured or the owner accompanied by this policy for proper endorsements, and thereafter the payment of the respective special premium shall not be required." (11, 12, 13)

Kortz paid all premiums upon this policy of insurance and all charges for the total and permanent disability provisions, and on June 28th, 1938, having previously filed proof of his total and permanent disability and made demand for the payment thereof, which demand was refused, brought suit in the District Court of the City and County of Denver, State of Colorado, to recover total and permanent disability benefits from September 10th, 1937 (10), on the ground and for the reason that he had been disabled by bodily diseases, particularly arthritis of the spine (14), osteo-arthritis of the lumbar spine, general debility and a heart ailment (15). This case was tried to a jury, which returned a verdict in favor of Kortz on March 30th, 1939 (284), covering the period from April 21st, 1938, to March 21st, 1939. The company by writ of error appealed the judgment of said District Court to the Supreme Court of the State of Colorado, and on May 11th, 1942, the Supreme Court affirmed said judgment (286). Thereafter, Guardian paid the judgment.

Guardian having refused to pay any benefits subsequent to those covered by the judgment, Kortz instituted a second suit against Guardian on June 15th, 1942 (20) in the District Court in the City and County of Denver, State of Colorado, which was removed to the United States District Court for the District of Colorado on the petition of Guardian (21). In this action, the complaint filed by Kortz in the State Court alleged the previous adjudication of plaintiff's total and permanent disability, and set forth in detail all proceedings in the previous cause, including the pleadings therein (7). Upon motion by Guardian and over the objection of Kortz, the Judge of the United States District Court struck from these pleadings all reference to the previous case in the District Court of the City and County of Denver and to its affirmance by the Supreme Court of the State of Colorado. An amended complaint was filed by Kortz in which he again referred to the trial, judgment and affirmance in the prior case (23), which reference was again stricken by the Judge of the United States District Court (27). A second amended complaint was then filed by Kortz in which in less specific terms reference was made to the prior trial and adjudication, whereupon upon motion of Guardian the Court again struck reference to the prior adjudication (31). Kortz then filed his written objection to the rulings of the Court (40).

The case was then tried to a jury in the United States District Court, which returned a verdict in favor of Guardian (41).

B. QUESTIONS PRESENTED.

The questions presented are:

1. Kortz having recovered a judgment which was affirmed by the Supreme Court of the State of Colorado to the effect that he was totally and permanently disabled for the period covered by said suit, did that judgment raise a presumption in law that said total and permanent disability continued?

2. If a presumption in law of the continuance of said total and permanent disability was created by the prior adjudication in the State Court, did that place the burden of proof upon Guardian to show a change of condition of

Kortz amounting to a recovery within the terms of the policy?

3. Should the trial court have determined as a matter of law that there was no change of condition upon the evidence presented?

4. Could the trial court disregard the express wording of the contract between Kortz and Guardian and make a new contract for them?

C. REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

1. The Circuit Court of Appeals for the Tenth Circuit has rendered its decision in this case, which decision is in direct conflict with the decisions of other Circuit Courts of Appeals.

The decision of the Circuit Court of Appeals is not published as yet, but will be found at pages 309 through 315 of the Transcript of Record. It will be noted that this opinion reviews the history of the case and the question of prior adjudication and its effect raised by Kortz (309-310). The decision then purports to follow the case of *United States Fidelity and Guaranty Company v. McCarthy*, 33 F. 2nd 7, 70 A. L. R. 1447, a case decided by the Eighth Circuit.

The Circuit Court of Appeals by its decision approves the instructions given by the trial court by the following statement in its opinion:

> "The court gave conventional instructions that the burden rested on plaintiff to establish his cause of action by a preponderance of the evidence. The burden did rest on him to establish by a preponderance of the evidence the fact that he was totally and permanently disabled during the period in question. That was the primary issue joined and the insured carried the burden of proving it. U. S. Fidelity and Guaranty Company v. McCarthy, 50 F. 2nd 2, certiorari denied, 284 U. S. 652. Therefore, it cannot be said that the general instruction was erroneous. But the instructions did not stop there. The jury was further in-

structed in substance that the adjudication of disability in the state court created a presumption that the condition continued in the future; that the presumption was strongest at the beginning and diminished in force with the lapse of time; and that the question for the jury to decide was whether the evidence in the case was sufficient to rebut or overcome the presumption. That instruction was substantially correct." (312-313)

The Circuit Court of Appeals for the Sixth Circuit in the case of *Kontovich v. U. S.*, 99 F. 2nd 661, at page 665 holds:

* * * * * "In a trial it will give full weight to the presumption of total permanent disability as previously judicially determined, and place upon the administrator the burden of proof to show subsequent change in the physical condition of the assured."

In *Countee v. United States of America*, 127 F. 2nd 761, 142 A. L. R. 1165, at 1169, the Circuit Court for the Seventh Circuit holds:

"In the instant case, the court below, relying upon our former decision, held the burden of proof was upon the Government to establish the affirmative of its contention that plaintiff had recovered the ability to continuously follow a gainful occupation. We reaffirm our holding in this respect. In the original action the burden was upon the plaintiff to sustain, by a preponderance of the evidence, the affirmative of the issue initiated by him. In the instant case, we see no reason why the Government should not be required, in a like manner, to sustain the affirmative of the issue originated by it. The finding in the original case of plaintiff's total and permanent disability carried with it the legal implication that such condition was reasonably certain to continue throughout life. Thus, a presumption was created in his favor which the Government was required to overcome. This necessitated that it carry the burden of proof with the right to open and close the case."

In the case of *Anderson v. U. S.*, 126 F. 2nd 169, the Circuit Court of Appeals for the Third Circuit says:

> "From these rulings the Government would draw the conclusion that the prior judgment can be given no future effect at all. This conclusion, however, is too broad. While a verdict permitting recovery under the War Risk Insurance Act cannot settle the question of future disability, it must contain a finding that the presently existing disability has a reasonable certainty of continuing. This finding cannot be ignored in future controversies. From it is born a presumption based upon the reasonable certainty of the continuance of the condition."

2. The Circuit Court of Appeals for the Tenth Circuit in this case and the District Court for the District of Colorado have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

The opinion of the Circuit Court wholly fails to point out any evidence presented in the District Court to show that Kortz had recovered; that the disability which had existed and had been judicially determined to exist in the trial in the state court had ceased; that there had been a recovery or any improvement in the condition of Kortz. The record discloses that there was no such evidence; that the same witnesses who had testified in behalf of Guardian in the first trial testified in behalf of Guardian in the second trial, to the same effect. Kortz at the close of his testimony moved for a directed verdict, relying upon the rule of law that a disability judicially determined to be permanent is presumed to continue until the contrary is shown by a preponderance of the evidence. This motion was overruled by the trial court (40) and ignored by the Circuit Court of Appeals in its opinion. Kortz then moved for judgment notwithstanding the verdict or for a new trial (42), which motion was denied by the trial court (48) and completely ignored by the Circuit Court of Appeals.

The trial court by its refusal to direct a verdict in favor of Kortz for the period following the adjudication of perm-

ment and total disability by the state court in the first trial up to and including the time that Guardian demanded due proof of the continuance of the claimed total and permanent disability, which demand was made after the second suit was started, disregarded the express wording of the contract of insurance wherein it is provided:

> "Recovery from Disability. Although the proof of total and permanent disability may have been accepted by the Company as satisfactory, the Company may at any time demand due proof of the continuance of such total disability, but not oftener than once a year after such disability has continued for two full years; and upon failure to furnish such proof or if it shall appear to the Company, except in the case of the Specified Disabilities mentioned above, and the Insured is able to perform any work or follow any occupation whatever for remuneration or profit, no further premiums shall be waived and no further income payments shall be made."

And made a new contract between the parties which gave the Guardian the right to question the continuance of the total disability within a period prohibited by the express terms of the agreement. The action of the trial court is approved by the opinion in the Circuit Court of Appeals (311).

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals of the Tenth Circuit, commanding said Court to certify and to send to this court for its review and determination a full and complete transcript of record and all proceedings in the case numbered and titled on its docket No. 2858, *Harry Kortz, Appellant, v. The Guardian Life Insurance Company of America, Appellee*, and for such other action as to this Court shall seem proper.

HARRY KORTZ, *Petitioner.*
By MAX P. ZALL,
904 Equitable Building,
Denver 2, Colorado,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. THE OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals of the Tenth Circuit in this case has not yet been reported in book form, but it is found in the printed record filed here at pages 309 to 314.

II. JURISDICTION.

A. The jurisdiction of this court is invoked under the judicial code and rule 38 of the rules of this court.

B. The date of the decree sought to be reviewed is May 24th, A. D. 1944 (315). A petition for rehearing was denied on June 19th, A. D. 1944 (319).

III. STATEMENT OF THE CASE.

A statement of the case is set forth in the Petition for Writ of Certiorari, appearing under heading A, filed herewith, and is hereby referred to and adopted.

IV. SPECIFICATION OF ERROR.

The errors assigned under heading "Questions Presented" as sub-heading B of the Petition for Writ of Certiorari, filed herewith, are hereby referred to and adopted as the specification of such of the assigned errors as are intended to be argued.

V. ARGUMENT.

A. Summary of the Argument.

1. Kortz having been judicially determined to be totally and permanently disabled in the case of *Guardian Company v. Kortz*, 109 Colo. 331, 125 Pac. 2nd 640, had the right and it was his duty to plead the proceedings in the court which had first judiciously determined his total and permanent disability Kortz was entitled to have Guardian plead to his complaint which set forth the proceedings in the prior trial, and to require Guardian to either admit or deny the effect of those proceedings, or if Guardian did not admit or deny the effect of those proceedings, to require Guardian to affirmatively plead that the condition of Kortz had so

changed or improved as to make him no longer permanently and totally disabled.

2. Kortz contends that he had the right in the trial of the second case to stand upon the prior adjudication of his total and permanent disability, and that he was under no obligation to and should not have been required by the trial court to again prove his total and permanent disability; that Guardian should have been required to prove by a preponderance of the evidence a change in Kortz's condition so that he was not at the time of the trial of the second case totally and permanently disabled.

3. Kortz contends that he was entitled to rely and stand upon the presumption in law of the continuance of the total and permanent diability which had been judicially determined to exist in the prior case.

4. Kortz contends that the trial court should have directed a verdict in favor of Kortz, there being no evidence of change or improvement introduced by Guardian; on the contrary, the evidence of Guardian was exactly the same evidence, exactly the same witnesses, offered in the trial of the previous cause.

5. Kortz contends that having entered into a contract with Guardian for which additional premiums were paid by him, he was entitled to have that contract as written enforced by the court, and having been judicially determined totally and permanently disabled, and no demand for proof of the continuance of such disability having been made by Guardian until the second suit was instituted for the period between the determination of the first suit and the notice of demand by Guardian, he was entitled as a matter of law to payment of disability benefits.

B. The argument.

1. The prior adjudication of a fact by a court of competent jurisdiction is res adjudicata or estoppel by judgment, and the fact so adjudicated "cannot again be litigated between the same parties and their privies whether the claim, demand, purpose or subject matter of the two suits is the same or not". *Henderson v. United States Radiator Corporation*, 78 F. 2nd, 674, at page 675 (C.C.A. Tenth Circuit).

That Kortz was judicially determined totally and permanently disabled is shown in the case of *Guardian Company v. Kortz,* 109 Colo. 331, 125 Pac. 2nd 640, where the court says at page 336:

> "That disability for which indemnity is payable under the contract is such as permanently, continuously and wholly prevents him from following any occupation whatsoever for remuneration or profit."

In the second case brought by Kortz for disability benefits, it was his right and duty to plead the prior proceedings in full, and it was the right and duty of Guardian to meet that plea either by admitting, denying or affirmatively avoiding the effect of it. This is the law under many decisions in the State of Colorado. In the case of *Pomponio v. Larsen,* 80 Colo. 318, the court at page 321 says:

> "It is fundamental, and well understood, that the judgment of any court of competent jurisdiction, so long as it remains unreversed, is conclusive upon the parties and their privies when the judgment is rendered upon the merits, and without fraud or collusion, upon a matter within the jurisdiction of the court rendering the judgment. Such a judgment is an absolute bar to the prosecution of a second action on the same claim or demand, not only as to matters actually in controversy in the first action, but as to every matter which might have been litigated and determined therein incident to and necessarily connected with the subject matter of the litigation."

And again at page 323 the court says:

> "Where the defendant pleads a former judgment in bar the plaintiff must admit or deny the judgment or deny that it was for the same cause of action."

Clearly the action of the trial court in sustaining the motions of Guardian to strike all reference to the prior case from the complaint, from the amended complaint and also from the second amended complaint is contrary to the above authority, and deprives Kortz of the right to have Guardian admit, deny or avoid by pleading a change of condition the effect of the prior adjudication.

2. That Kortz had the right as a matter of law to stand upon the prior adjudication of his total and permanent disability is definitely supported by the case of *Counter v. U. S.*, 127 F. 2nd 761 (C.C.A. Seventh Circuit).

3. As a matter of law, there was a presumption that a disability once having been judicially determined to be total and permanent would continue until a change of condition, an improvement or a recovery was proved by Guardian by a preponderance of the evidence.

Anderson v. U. S., 126 F. 2nd 169 (C.C.A. Third Circuit), *Edmonds v. U. S.*, 24 Fed. Supp. 742, *Countee v. U. S.*, 127 F. 2nd 761 (C.C.A. Seventh Circuit), *Kontovich v. U. S.*, 99 F. 2nd 661 (C.C.A. Sixth Circuit): All of these cases and many in the federal courts recognize the presumption of the continuance of total and permanent disability raised by a judicial determination by a court of competent jurisdiction, and recognizes and places the burden of proof on the insurance company that a change, an improvement or a recovery has occurred. There are many cases in the state courts supporting exactly the same proposition. *Equitable Life Assurance Society v. Bagley*, 94 S.W. 2nd 722 (Ark.); *Metropolitan Life Insurance Company v. Pribble*, 130 S.W. 2nd 332; there is an annotation on this subject which quite thoroughly exhausts the cases and is found at 142 A.L.R. 170.

One of the most flagrant cases to demonstrate the reason for this rule is the case of *Boillot v. Income Guaranty Company*, 124 S.W. 2nd 613, a Missouri case. In this case the insurance company refused to make payments to a piano tuner who had a policy of insurance providing for indemnity in case of total and permanent disability. A suit was brought, and a jury found the insured to be totally and permanently disabled. The case was taken to the appellate court of the State of Missouri and affirmed. The judgment so entered was paid. Thereafter the company refused to make further payments. The assured brought suit, pleading the prior adjudication. The company admitted the prior adjudication, but attempted to again raise the question of the total and permanent disability without showing any change of fact. The trial court held that the prior adjudication was res adjudicata or estoppel by judgment, and there being no

change of condition pleaded or proved, as a matter of law the assured was entitled to judgment.

The reported case reviews the steps which the assured was required to take. There were five distinct cases brought prior to the one reported, and the court after the second case under a Missouri statute assessed special damages against the insurance company for its arbitrary refusal to pay the claim, and reviews the burden that would be placed upon an assured if it were not for the presumption of the continuance of the existence of the total and permanent disability of having to prove its existence every time the company refused to make payments. A company could so harrass the assured and could by arbitrary refusal so burden the assured that the benefits of the insurance for which premiums were paid could be completely destroyed.

A further basis for this very sound rule is the need to develop and insure recognition of and respect for judicial conclusions in courts of competent jurisdiction. This basis, this need and this thought is very clearly expressed by a decision of this court, an early decision, which has been recognized many times since and quoted; the case of *Southern Pacific Railroad v. U. S.*, 42 L. Ed. 355, 168 U. S. 1, where the court at page 48 says:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; *and, even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established,* so far as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as be-

tween parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." (Italics ours.)

4. This court has the right to examine the evidence offered by Guardian in the trial of this cause to determine whether or not there was sufficient to show a change of condition, an improvement or a recovery on the part of Kortz. This court in the case of *Universal Oil Products Company v. Globe Oil and Refining Company,* being case No. 392 and decided in May, 1944, and not reported, re-examine the factual questions involved.

A re-examination of the factual questions involved in this case, and particularly the witnesses of Guardian, will show that Dr. Robert G. Packard testified that he had examined Kortz both before and after March 21st, 1939 (this date being the date of recovery in the first case); that there was no change shown by the X-rays taken in 1943 prior to the trial of this case from those taken previously (188); that from a study of the X-ray pictures, he found that over a period from 1937 to May 4th, 1943, the condition as to the arthritis is virtually unchanged (198).

Dr. Ward Darley, a witness for Guardian, testified that he had first examined Kortz on March 21st, 1939, which was prior to the trial of the first case, at which he testified, and again examined Kortz on July 14th, 1943 (215); that he could not demonstrate evidence of heart disease at either examination; that the cardiogram taken July 9th, 1943, showed the inversion of the T wave in Lead 3 and the left axis deviation is the same as the cardiogram taken in 1939 (225).

These were the only medical witnesses offered by Guardian, and nowhere in their testimony is there any statement of change, improvement or recovery.

Guardian offered motion pictures of Kortz, showing him walking, getting out of an automobile, etc. Of course, the motion pictures cannot be attached to the record, but it is singular that neither the motion pictures nor any testimony was offered to show that Kortz was engaging in his usual vocation or had engaged in his usual vocation or was not disabled from so engaging.

It is respectfully urged that this court review the evidence offered by Guardian, and it is respectfully contended that a review of that evidence will lead to the conclusion which is inescapable, that Guardian failed wholly to overcome the presumption of the continuance of the disability or to prove by a preponderance of the evidence or at all a change of condition, an improvement or a recovery. With the evidence offered, the trial court should have directed a verdict for Kortz, and failing in this, after the jury returned its verdict, should upon the motion of Kortz to enter judgment in his favor notwithstanding the verdict, have entered a judgment for Kortz.

5. The final proposition urged is that the trial court made a new contract for the parties. There was nothing illegal about the provision of the contract to the effect that a total and permanent disability having once been established and having continued for two years could not be questioned by Guardian nor demand made for proof of such continuance at intervals of less than one year. This was the contract which Guardian sold Kortz. This was the contract which Guardian prepared and for which clause and provision Kortz paid an additional premium. Kortz was entitled to the repose and freedom from harrassment which this provision gave him, having been judiciously determined totally and permanently disabled for more than two years prior to the institution of the second suit, when the demand for proof of continuation of disability was made. There was no public policy involved. The provision was reasonable.

The reference of the Supreme Court in the first trial would appear to be very appropriate in the discussion of this point, where the court at page 336 says:

> "We think this is a reasonable and logical resolution of the conflict that ordinarily exists between the agent's selling construction and the claim agent's settling construction of such clauses."

Undoubtedly when this contract was sold to Kortz, the agent's selling talk was that if he were so totally and permanently disabled within the terms of the policy, the company could not and would not worry, annoy and harrass him with constant examinations and constant demands for proof

of continuance of disability, and that payments would continue until demand for proof was made, and that demand for proof under the policy after payments had continued for two years could not be made more often than once a year.

VI. CONCLUSION.

In conclusion, your petitioner respectfully urges this court to consider what was done by the Circuit Court of Appeals and by the United States District Court which tried this cause, not what the respective opinions of these courts say was done.

What did the action of the trial judge and the approval of that action by the Circuit Court do to your petitioner's rights?

He was denied the right to plead the prior adjudication. He was denied the right to require Guardian to answer that plea. He was denied the right to rely upon a presumption in law of the continuance of a disability once judicially determined to be total and permanent. He was required to assume the burden of proving the continuance of this disability, while Guardian was relieved of the duty of proving by a preponderance of the evidence a change of condition.

The trial court expressly placed the burden upon Kortz to prove by a preponderance of the evidence his disability, and then in a feeble way made some involved reference to a presumption (267), and the trial court in closing its instructions stated:

> "The burden of proof is upon the plaintiff to establish his cause to your satisfaction by a preponderance of the evidence. That means that if the evidence is equally balanced when you weigh it or is in favor of the defendant, then the plaintiff has not sustained that burden, and cannot recover. On any contested point his evidence must to some slight degree at least outweigh the evidence of the defendant before you can find a verdict for the plaintiff. That is what is meant by the preponderance of the evidence or the burden of proof" (273).

Nowhere does the court say that there is any burden upon Guardian. The effect of the decision is in direct conflict with the decisions of the Circuit Courts of three other circuits, and this court should for all time settle this conflict so that litigants can with some degree of security know which of the decisions of the various circuits shall control.

Kortz did not receive that kind of fair trial based upon the laws which he had a right to expect.

The Writ of Certiorari should, we respectfully submit, be granted.

Respectfully submitted,

MAX P. ZALL,
Denver, Colorado,
Counsel for Petitioner.

No. 280

SEP 5 1944

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

HARRY KORTZ, PETITIONER,

vs.

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,
A CORPORATION, RESPONDENT.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

LOWELL WHITE,
Denver, Colorado,
Counsel for Respondent.

PEERLESS PRINTING COMPANY, DENVER

SUBJECT INDEX.

TABLE OF CASES CITED.

TEXTS CITED.

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No. 280

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BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

The petition for a writ of certorari and the supporting brief have not made the required showing for the issuance of such a writ. The brief treats the present proceeding as an ordinary writ of error or appeal. But, on that basis the petitioner has failed to show that his rights have been wrongfully invaded by either the District Court of the United States or the Circuit Court of Appeals.

HISTORY OF THE PROCEEDINGS.

In June, 1938, this petitioner commenced an action against this respondent in a District Court of the State of Colorado, claiming and seeking disability benefits provided for in the policy involved in this action. At the trial there was a sharp conflict in the medical evidence. However, some of the evidence showed that there was a tendency towards improvement. At the request of peti-

tioner, the jury was instructed that it could find a verdict for the petitioner if it found him totally and continuously disabled for not less than three consecutive months. The jury awarded petitioner disability benefits to March 21, 1939. The case was taken to the Supreme Court of the State of Colorado and that Court held there was sufficient evidence to sustain the verdict. At no time during the proceedings in the trial court or the Colorado Supreme Court was there any effort made to adjudicate whether or not this petitioner would be disabled in the future.

In the present case, none of the pleadings filed by petitioner alleged that he was entitled to judgment under the theory of res adjudicata or estoppel by judgment. Nor did he allege that the previous trial settled or adjudicated the question of his disability since March 21, 1939. At no time prior to or during the trial, did petitioner move for judgment because of the judgment in the previous case. He never claimed that the issue of total and permanent disability involved in this case was settled or adjudicated by the first case. Nor did the petitioner move or suggest that respondent had the affirmative of the issue in this case, and that it should be required to assume the burden of proving that petitioner had recovered from the ailments and disability existing at the time of the first trial. The only motion made by petitioner during trial was a perfunctory motion for a directed verdict. In other words, the plaintiff at all times recognized that he had the affirmative of the issue of whether he was totally disabled during the period involved in this action. Without applying for any ruling of court he voluntarily assumed the burden of proving his disability and with alacrity he opened and closed the case.

As a part of his proof in this case he offered the pleadings, verdict, and judgment in the first case. At the time of trial, the only effect petitioner claimed for that evidence was that it raised a rebuttable presumption or inference of fact that his disability continued and that the burden of going forward with evidence to rebut that inference, shifted to the respondent.

At the end of the evidence the petitioner's motion for directed verdict (262) followed the same theory adopted by the plaintiff and followed by the trial court throughout. The only ground for the motion was the claim that the respondent had not gone forward with such evidence and it had not proved that the disability had been removed and that it had been established beyond question that plaintiff's condition had progressed substantially. That motion raised a question of fact, only, and was overruled.

During the time for tendering and discussing the instructions the petitioner made no motion or suggestion that he was entitled to judgment because of the previous judgment. Nor did he request that any of the thoughts which he now raises be embraced in any instruction. He insisted that the court instruct the jury that the fact that the first case had found petitioner to have been totally disabled created a presumption of fact that said disability continued and, because of that inference of fact, the respondent was required to go forward with the evidence to overcome and rebut that presumption. Such instruction was given as requested, and naturally was not objected to by the petitioner. There was then submitted to the jury the questions whether or not the respondent's evidence was sufficient to overcome and rebut the presumption that petitioner's disability continued during the period involved in this action, and, whether or not he was totally disabled during this period. Upon the conflicting evidence, the jury determined those questions against the petitioner in favor of the respondent.

The petitioner filed a lengthy motion for judgment, notwithstanding the verdict, and in the alternative for a new trial (42). However, he did not contend that the court erred in not requiring the respondent to assume the burden of proof, nor was there any claim that the petitioner is entitled to judgment under the doctrine of res adjudicata or estoppel by judgment.

The arguments presented to the court are unsound and of no consequence even if considered on their merits,

but it may save time if this court realizes that throughout the trial of this case, the theory of the petitioner was followed by the court. The questions now argued were never raised or presented to the court in any manner before the close of the trial. Under the Rules of Civil Procedure and by long established practice, those matters can not now be assigned as error or considered by an Appellate Court.

If this were an ordinary appeal or writ of error, the petitioner has failed to show any grounds for the reversal of the judgment of the trial court and the decision of the Circuit Court of Appeals, and certainly he has shown no reason why a writ of certiorari should be granted.

ACTION ON A CONTRACT.

The present action is one based on a written contract between the parties. It provides that petitioner is entitled to benefits in the event he becomes totally and permanently disabled, *or* if his total disability continues for at least three months. The contract provides:

> "* * * the disability * * (is) presumed to be permanent if it is present and has been in existence continuously for no less than three consecutive months. * * * (11).

Of such a clause the Colorado Supreme Court in the case of *Clark v. Equitable Life Assurance Society,* 100 Colo. 490, 68 Pac. (2nd) 541, said:

> "Her *permanent* disability is a fiction elevated to the dignity of fact by contract. * * *" (Court's italics.)

The fiction which permits a plaintiff to recover for temporary total disability does not make that disability permanent in fact. The contract also states:

> "The Company will begin to pay * * * from the date of the receipt by the Company of satisfactory proof of total and permanent disability of Insured *or* of the Insured's continuous total disability for three consecutive months." (12).

If an assured is permitted to recover because he has been totally disabled for more than three months, but his disability is temporary in character, no presumption of continuance should flow from such an award.

In the trial of this case petitioner introduced into evidence the pleadings, verdict and judgment. The trial court suggested that plaintiff introduce the instructions to show what question had been submitted to the jury (64, 65). None of the instructions was tendered. If they had been introduced they would have shown that the jury in the first case was instructed that petitioner might recover if he were found to have been disabled not less than three consecutive months. In other words, he was allowed to recover from total, temporary disability. That being so, there is no basis for the claim that there was a jury finding or a judicial determination that the petitioner was totally and permanently disabled.

Every purported assignment of error or argument appearing in the petition and supporting brief assumes and states that petitioner had been adjudicated totally and permanently disabled. His verdict and judgment were based upon a fiction of permanence, or a finding of temporary, total disability. The issue submitted to the jury in the first case is not in the record. Therefore, there is nothing for the Court to consider. There is nothing to show that he was found to be actually permanently disabled.

Petitioner's proof consists of his complaint alleging he is permanently disabled, and the general verdict of the jury. This cannot be said to be a finding of permanent disability in view of the contract which provides the same benefits for continuous, total disability as for actual permanent disability. Thus, the foundation and base of each of petitioner's present contentions are washed away, and there is nothing left to consider.

WAR RISK CASES ARE NOT APPLICABLE.

The petitioner relies upon the war risk cases. It is not necessary to discuss the soundness of the cases cited,

since they are fundamentally distinguishable from the case at bar. War risk cases are based on Treasury Regulations and Procedure of the U. S. Veterans Bureau, Page 9, which says that a plaintiff is not entitled to recover unless the disability is founded upon conditions which render it reasonably certain they will continue throughout life.

The 7th Circuit Court of Appeals in *Countee vs. U. S.*, 127 Fed. (2d) 761, 142 A. L. R. 1155 appears to argue against the soundness of its former decision that the burden is on the government to show recovery of the ability to continuously follow a gainful occupation. Nevertheless, its sole justification for such a holding is because:

> "A finding in the original case of the plaintiff's total and permanent disability carried with it the *legal implication that such condition was reasonably certain to continue throughout life.*" (Italics ours.)

As previously shown there is no evidence of a comparable finding or basis for the verdict in the first Kortz case.

PETITIONER HAD THE BURDEN OF PROVING HIS CASE.

All petitioner's claims are directly answered in the well-reasoned, leading case of *U. S. F. & G. v. McCarthy*, 33 F. (2) 7, which is directly in point. In 1924 plaintiff brought a suit to recover the accrued disability payments and judgment was rendered in his favor for the period of December 6, 1923, to October 22, 1925. The company paid that judgment. The case reported covers the period from October 22, 1925, to February 23, 1928. Plaintiff's pleaded the proceedings in the former action to "prevent a re-litigation of all the issues tried in that suit." Plaintiff's theory was that every fact essential to recovery had been introduced to warrant a finding of improvement in his condition since the previous adjudication. The court said:

> "The question litigated was continuous total disability during the period for which recovery was sought. The period of time covered in this

case was then in the future. As the burden there was upon appellee to show continuous total disability for the period involved, the same burden rests upon him to show such continuous total disability for the period here involved, and the right under the terms of the policy is in the appellant to contest the question of such total disability for every period of time provided by the terms of the policy.

"* * * It is apparent that it was not the intention of the parties to the contract that total disability established for one period should establish the same for a subsequent period.

"If the appellee had introduced the record in the former case and rested, and appellant had introduced no evidence, certainly a court could not have told the jury that there was a presumption therefrom that the total disability there found would continue to exist over the period in suit."

"Disability is not entirely a physical matter. Will power and condition of mind enter into it. A person may be disabled today, and in a year from now, without any change in the physical condition, not be disabled.

* * *

"That his hand remains in the same condition is not conclusive that his disability also continues. Indemnity under the policy was for disability—not for injury to the hand.

* * *

"We are satisfied that the claimed estoppel by judgment is not sufficient to establish total disability for the period of time covered by this action. The ultimate fact in the previous suit as to disability was total disability during the period for which indemnity was sought. The ultimate fact here is total disability for an entirely separate and definite period of time. That question was not in issue, and could not have been litigated

in the former action. Each case stands upon its own bottom."

Regardless of whether or not the issue in the first case was continuous, total disability or total and permanent disability, for the purposes of this argument let us assume that during the period involved in the first action petitioner was found to have been not only totally, but permanently, disabled. Even under such circumstances no reason has been shown why this petition should be granted.

The contract between the parties makes it plain that the petitioner would not be entitled to disability benefits except during disability. In the first place, payments are to be commenced when the disability has been proved. Secondly, such payments will be "made" * * * during * * * the continuance of such disability." After such total and permanent disability has been proved and payments made, the parties agree that " * * * if it shall appear to the company * * * that the insured is able to perform any work or follow any occupation whatsoever for remuneration or profit, no further premiums shall be waived, and no further income payments shall be made." In view of such a contract, any claim that the first trial was res adjudicata of the second, or that by reason of the first, the defendant is estopped to defend the second, or that there is a conclusive legal presumption that petitioner continues to be disabled is all a matter of grasping at straws after a case has been submitted and tried upon the petitioner's own theory and then lost.

PETITIONER'S POINTS.

Apparently petitioner, in his point or argument No. 1, claims that he is entitled to judgment under the doctrine of res adjudicata or estoppel by judgment. They are not the same, but since neither applies the following should suffice.

a. In order for res adjudicata to be applicable it must be shown that the subject matter of the two cases is identical, and that the evidence of one case would prove the issues in the other. *Pomponio vs. Larsen,* 80 Colo. 318; 251 Pac.

534. In the two Kortz cases the first involved disability from 1937 to 1939, and the second one from 1939 to 1943. That certainly is a difference in the subject matter. Evidence which was competent and relevant in one case would not prove the issue in the other.

b. Estoppel by judgment is not available except when an issue in the second case was actually presented and decided in another case. The issue here, was plaintiff totally disabled from March, 1939 to 1943? That issue could not and was not presented, and was not decided in the first case.

c. Apparently petitioner claims that his first case was decisive of the second because he was there found to be permanently disabled. There is nothing in the present case to show that the question of permanent disability was submitted to the jury, and, as a matter of fact, as previously shown, only the question of continuous disability was presented to the jury in the first case.

d. To be available, petitioner must have pleaded a claim which showed that he was entitled to relief under the theory of res adjudicata, or estoppel by judgment. This was not done.

e. There was no pleading of res adjudicata or estoppel by judgment in any of petitioner's three complaints. The ultimate fact alleged in each of petitioner's three complaints was that he was totally disabled during a certain period. An answer, the same as the one filed, could have been filed to each of the complaints before anything was stricken therefrom. The net result or the issue thereby formed would have been exactly the same as that under which the case was tried, i.e., petitioner alleged he was totally disabled during a certain period, and defendant denied that claim. The petitioner had the affirmative of that issue.

f. (1.) Assume that the Court erred in striking parts of the three complaints. Each of those errors was cured, in that everything which was stricken was introduced into evidence.

(2.) Again suppose, that the complaint constituted a plea of res adjudicata or estoppel by judgment. Plaintiff had everything in evidence which had been stricken from each complaint, but he made no motion for judgment on the grounds of res adjudicata, estoppel by judgment, nor did he otherwise make known to the Court the action which he desired, namely, judgment because of the previous adjudication.

(3.) The trial court cannot be charged with error in not giving him judgment which he did not request, or in overruling a motion (Rule 50) which was never made, or in refusing an instruction which was never tendered (Rule 51, Rules of Civil Procedure).

In petitioner's Point No. 2 he says he had a right to stand upon the prior adjudication of his total and permanent disability. We have previously shown that there was no such adjudication. Further, even if he had been adjudicated totally and permanently disabled, that would not prove that he was totally and permanently disabled during the period involved in this action, and there is nothing in the case of *Countee v. U. S., supra,* to support such a contention.

In Point No. 3 of the summary of the argument petitioner refers to a presumption of law. He previously used this term in No. 1 assignment of error, and it would appear that he is using it as synonymous with res adjudicata. If so, that has been previously covered. At time of trial he claimed a right to nothing but a so-called presumption or inference of fact of the continuance of total and permanent disability. And, in conformity with that contention, the court gave such an instruction as requested by petitioner (267).

In Point No. 4 petitioner seeks to have this Court pass upon questions of fact.

Doctors Darley and Packard testified that the petitioner's arthritis had reached the quiescence stage, that he was not suffering from a lack of circulation of the heart,

that there was nothing disabling him, and that petitioner could perform all the duties he previously performed, and the performance of that work would do him good (217, 219, 220, 188, 189, 190).

Although there is no burden upon respondent to prove a recovery, such evidence is proof of recovery if the jury believed it, and the jury did believe the evidence. The issue of disability during the period here involved was fully and finally determined by the proper trier of the facts, after a trial of the case following the petitioner's theory and under instructions submitted and requested by petitioner.

With regard to Point No. 5 it seems unnecessary to elaborate upon this illusory point, and sufficient statement of it appears in the opinion of the Circuit Court of Appeals.

CONCLUSION.

Petitioner never pleaded or attempted to plead more than a mere recital of the happenings in the first case, and then he was allowed to put everything in evidence with regard to the first case which he offered. At no time did he claim that the first case was an adjudication of the second. He opened and closed the case, voluntarily assumed the burden of proving his disability, and his theory of the case was followed throughout by the trial court. He was denied nothing except his motion for directed verdict, the reasons for which were obviously questions of fact.

The result achieved by the jury is a just one, after a fair trial, and there is nothing in the opinion of the Circuit Court of Appeals which is in conflict with the decisions of other courts of appeals. There is nothing to justify the petition.

Respectfully submitted,

LOWELL WHITE,

Counsel for Respondent.